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In the Supreme Court of the United States

OCTOBER TERM, 1955

UNITED STATES OF AMERICA, PETITIONER

v.

ETTORE ZUCCA, ALSO KNOWN AS MARIO SARNI, ALSO KNOWN AS ETTORE SARNI ZUCCA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	4
Conclusion	9
Appendix	11

CITATIONS

Cases:

Schwinn v. *United States*, 112 F. 2d 74, affirmed *per curiam*, 311 U.S. 616	4-5, 8
United States v. *Brown, Stefena*, unreported, E. D. Mich., No. 12628, Feb. 15, 1955	5
United States v. *Collins*, unreported, S.D. N.Y., Civ. Div. 93-39, Jan. 4, 1955	5
United States v. *Favorito*, 7 F.R.D. 152	5
United States v. *Fischer, Leo*, unreported, N.D. Ill., No. 54 C 614, March 2, 1955	5
United States v. *Jerome*, 115 F. Supp. 818	5
United States v. *Kaplan, Hyman*, unreported, D. Conn., Civ. Action 3509, March 28, 1955	5
United States v. *Knight*, 291 Fed. 129, affirmed, 299 Fed. 571	5
United States v. *Leles*, 227 Fed. 189	5
United States v. *Lustig*, 110 F. Supp. 806	5
United States v. *Mankin*, unreported, W.D. Pa., C.A. #10934	5
United States v. *Miller, Celia*, unreported, N.D. Cal., March 24, 1955	5
United States v. *Radzie*, 14 F.R.D. 151	5
United States v. *Ronch*, unreported, S.D. N.Y., Civ. Div. 77-290 (1953)	5
United States v. *Schuchhardt*, 48 F. Supp. 876	5
United States v. *Shinkevich, Alexander*, unreported, E.D. Pa., April 26, 1955	5
United States v. *Tuteur*, 215 F. 2d 415	4

Statute:

Page

Immigration and Nationality Act of 1952, 66 Stat. 163, 260, 8 U.S.C. 1451(a) (1952 ed.), Section 340(a) 2

Miscellaneous:

40 Cong. Rec. 3640 7

H.R. 15442, 59th Cong., 1st sess. 7

9 Richardson, *A Compilation of the Messages and Papers of the Presidents: 1789-1897* 7

Atty., George C. Mantzoros, Asst. U.S. Atty., and Lester Friedman, Atty., Immigration and Naturalization Service, New York City, on the brief), for plaintiff-appellant.

Orrin G. Judd, New York City (Goldstein, Judd & Gurfein, Morris A. Wirth, Earle K. Moore, and Irwin M. Rosenthal, New York City, on the brief), for defendant-appellee.

PER CURIAM.

Affirmed on the opinion of District Judge Palmieri, D.C.S.D.N.Y., 125 F. Supp. 551.

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the judgment of the United States District Court for the Southern District of New York, which held that the filing of an affidavit of good cause is a prerequisite to a denaturalization proceeding under Section 340(a) of the Immigration and Nationality Act of 1952.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in the Appendix, *infra*, pp. 11-12, has not yet been reported. The opinion of the District Court (R. 15-27) is reported at 125 F. Supp. 551 (Appendix, *infra*, pp. 14-28).

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1955 (Appendix, *infra*, pp. 13-14). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the filing of an affidavit showing good cause for revocation of naturalization is a prerequisite to the maintenance of a denaturalization suit under Section 340(a) of the Immigration and Nationality Act of 1952.

STATUTE INVOLVED

Section 340(a), Immigration and Nationality Act of 1952, 66 Stat. 163, 260, 8 U.S.C. 1451(a) (1952 ed.):

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 310 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization

on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, * * *.

STATEMENT

Ettore Zucca was admitted to citizenship on January 4, 1944 (R. 3). In 1954, the United States Attorney for the Southern District of New York, proceeding under Section 340(a) of the Immigration and Nationality Act of 1952, *supra*, filed a verified complaint seeking revocation of such naturalization on the grounds of illegality, concealment of material facts, and wilful misrepresentation (R. 3-10). The complaint stated that good cause existed for the institution of the suit (R. 9), but did not refer to any affidavit showing good cause or append it to the complaint.

The defendant moved to have the complaint dismissed on the ground, among others, that plaintiff failed to file an affidavit showing good cause (R. 11).

The district court held that, before a United States Attorney may institute a denaturalization proceeding, he must be furnished with an affidavit of good cause and, further, that he must file it with the court when instituting the proceeding (R. 26). It ordered the complaint dismissed unless the Government filed an affidavit of good cause within 60 days (R. 30). On February 14, 1955, a final order and judgment dismissed the complaint without prejudice to the Government's right to in-

stitute an action to denaturalize the defendant upon filing the affidavit (R. 33). On appeal to the Court of Appeals for the Second Circuit, the order of the district court was affirmed.

REASONS FOR GRANTING THE WRIT

1. The decision of the Second Circuit in the instant case is directly contrary to the holding of the Seventh Circuit in *United States* v. *Tuteur*, 215 F. 2d 415, where, in a proceeding to review a summary judgment canceling a certificate of naturalization, the court overruled the contention that the district court should have dismissed the petition for lack of jurisdiction in that the action was instituted without a supporting affidavit showing good cause. It is also contrary to the ruling of the Ninth Circuit in *Schwinn* v. *United States*, 112 F. 2d 74, affirmed *per curiam*, 311 U.S. 616.[1] Although the *Tuteur* case arose under Section 338 of the Nationality Act of 1940 and the *Schwinn* case under Section 15 of the Nationality Act of 1906, the clauses of these sections referring to the affidavit are identical to the affidavit clause of Section 340(a) of the Immigration and Nationality

[1] The transcript of the record in that case shows that the affidavit was filed with the complaint. The point as to the necessity for an affidavit was discussed by the Court of Appeals in connection with the argument that the judgment should be reversed because no evidence had been introduced at the trial to the effect that the district attorney had been presented with an affidavit showing the deficiencies in the petition for naturalization. The affidavit issue was not argued before this Court, which affirmed the judgment below on the ground that citizenship had been illegally procured.

Act of 1952, which is here involved. The Ninth Circuit stated in the *Schwimm* case (pp. 74-75):

> This affidavit is not jurisdictional, but merely makes it the duty of the district attorney to proceed. The district attorney could institute proceedings of this character sua sponte whenever he had reason to believe that the law had been violated in the respect alleged in the petition.

The Second Circuit in its *per curiam* opinion in this case relied upon the opinion of the district court, which recognized the conflicting view of the Seventh and Ninth Circuit and also of several district courts: *United States* v. *Jerome*, 115 F. Supp. 818 (S.D. N.Y.); *United States* v. *Lustig*, 110 F. Supp. 806 (S.D. N.Y.); *United States* v. *Knight*, 291 Fed. 129 (D. Mont.), affirmed, 299 Fed. 571 (C.A. 9); *United States* v. *Leles*, 227 Fed. 189 (N.D. Cal.).[2]

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[2] See also to the same effect: *United States* v. *Radzie*, 14 F.R.D. 151 (S.D. N.Y.); *United States* v. *Ronch*, unreported, S.D. N.Y., Civ Div. 77-290 (1953); *United States* v. *Collins*, unreported, S.D. N.Y., Civ. Div. 93-39, Jan. 4, 1955; *United States* v. *Stefena Brown*, unreported, E.D. Mich., No. 12628, Feb. 15, 1955; *United States* v. *Leo Fischer*, unreported, N.D. Ill., No. 54 C 614, Mar. 2, 1955; *United States* v. *Celia Miller*, unreported, N.D. Cal., March 24, 1955; *United States* v. *Hyman Kaplan*, unreported, D. Conn., Civ. Action 3509, March 28, 1955; *United States* v. *Alexander Shinkevich*, unreported, E.D. Pa., April 26, 1955; *United States* v. *Mankin*, unreported, W.D. Pa., C.A. #10934. Cases containing dicta to the effect that the affidavit is not jurisdictional are: *United States* v. *Schuchhardt*, 48 F. Supp. 876 (N.D. Ind.); *United States* v. *Favorito*, 7 F.R.D. 152 (N.D. Ohio).

This conflict of circuits is one which should be resolved by this Court. It affects not only numerous pending denaturalization actions in which no affidavit has been filed, but the future course of action by United States Attorneys in such suits. Moreover, the question of the necessity for filing the affidavit has implications beyond the immediate point directly at issue. The district court in this case, in ruling that filing of the affidavit was required, stated that "the protection afforded by the requirement of an affidavit of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial" (Appendix, *infra*, p. 27). Thus, the holding in the instant case raises problems as to the nature of the affidavit—whether it can be based on information and belief after consideration of evidence accumulated in an administrative investigation, or whether there must be an affidavit of some one having personal knowledge. It also raises problems as to the conduct of the judicial proceeding—whether there can be in effect a pre-trial of the issues in the guise of a determination as to whether there is good cause for instituting the action. In short, the issue as to the necessity for filing the affidavit presents more than a mere technicality; it may seriously affect the practice in denaturalization cases.

2. We believe that the holding of the Seventh and Ninth Circuits is correct. The statute simply makes mandatory the institution of proceedings to denaturalize when a showing of good cause is esta-

blished. Prior to the Act of 1906, which was the first to provide a statutory method of denaturalization, bills in equity had been filed by United States district attorneys to accomplish denaturalization.[3] The Act of 1906, therefore, only made mandatory what was previously discretionary. It is not fitting to attribute to Congress the intention that a district attorney, knowing of the fraudulent or illegal procurement of a naturalization certificate, must sit idly by and await the filing of an affidavit, setting forth what he already knows, before he can proceed.

The legislative history relied upon by the district court below is inconclusive. It shows merely that the provision making it the duty of the United States Attorneys to act on an affidavit of good cause was added by Congress without explanation in 1906, when it was considering the proposed uniform naturalization law drafted by members of the Commission on Naturalization appointed by President Theodore Roosevelt. The affidavit requirement first appeared in Section 17 of H.R. 15442, 59th Cong., 1st sess., which was based on the draft prepared by the Commission, as a provision that the "United States shall, upon affidavit made by any credible person, have the power to institute proceedings * * *." The change in language to the present form, making it the duty of the United States Attorneys to act, was without recorded con-

[3] See 40 Cong. Rec. 3640; President Harrison's Address to Congress, 1890, 9 Richardson, *A Compilation of the Messages and Papers of the Presidents: 1789-1897*, p. 116.

gressional comment or debate. The legislative history is thus consistent with the view that Congress intended to require United States Attorneys to take action when they were presented with an affidavit of good cause, rather than leaving the matter to their discretion.

The district court also found support for its interpretation in a letter dated March 26, 1907, from the Attorney General of the United States advising the Secretary of Commerce and Labor, who was then charged with the administration of the immigration and naturalization laws, that the filing of an affidavit was necessary to give a United States Attorney authority to institute denaturalization proceedings. That letter, however, loses its authority in the face of the contrary construction in the *Schwinn* case, 113 F. 274, affirmed 311 U.S. 616, decided in 1940, long before reenactment of the clause in the 1952 Act. Although the practice among United States Attorneys has not been consistent, the ruling of the *Schwinn* case has been relied upon by many United States Attorneys for a long period.

CONCLUSION

In view of the conflict between the Second Circuit, in this case, and the Seventh and Ninth Circuits, in earlier cases, and in view of the importance of the question presented in the administration of the Immigration and Nationality Act of 1952, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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